APPENDIX

APPENDIX A

Opinion by Justice Lawrence W. I'Anson

Richmond, Virginia, November 27, 1972

Records Nos. 7917, 7918, 7919

Present: I'Anson, Carrico, Harrison, Cochran, Harman and Poff, JJ.

OLD DOMINION BRANCH NO. 496, NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO and THE NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

v.

HENRY M. AUSTIN, L. D. BROWN and ROY P. ZIEGENGEIST

FROM THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND

A. Christian Compton, Judge

Defendants, Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO, and The National Association of Letter Carriers, AFL-CIO, are here on writs of error to three judgments entered against them on jury verdicts rendered in separate actions brought by the plaintiffs, Henry M. Austin, L. D. Brown, and Roy P. Ziegengeist, under Virginia's insulting words statute, Code § 8-630. The three cases were tried together and the jury awarded each plaintiff compensatory damages of $10,000 and punitive damages of $45,000.

Defendants contend (1) that Code § 8-630 is unconstitutional on its face; (2) that the doctrine of federal preemption precludes the State court from exercising jurisdiction in these cases; (3) that the publication complained of was constitutionally protected free speech under the First and Fourteenth Amendments to the Constitution of the United States; (4) that instruction No. 4 was erroneous; and (5) that the damages awarded were excessive.

The evidence shows the following: Defendants were duly recognized as the exclusive collective bargaining representatives for all letter carriers in the Richmond, Virginia, area. Dues were deducted by the post office accounting office from the union members' pay checks and forwarded to the national labor union's office, and the latter office sent the local "Branch" its share of the amount collected.

Plaintiffs Austin, Brown and Ziegengeist were employed as letter carriers by the United States Postal Service in Richmond, but they were not members of the union.

In several issues of "Carrier's Corner," a monthly newsletter published by the local Branch under the emblem of the National Association of Letter Carriers, the names of the letter carriers who had not joined the union were shown under the heading "List of Scabs." Plaintiff Austin complained to the president of the Branch and was told that this was the method used to force non-union members to join the union.

The June 1970 issue of "Carrier's Corner" carried the "List of Scabs," which consisted of fifteen names, including those of the three plaintiffs. Immediately above this list the following appeared:

"The Scab

"Some co-workers are in a quandary as to what a scab is; we submit the following:

'After God had finished the rattlesnake, the toad, and the vampire, He had some awful substance left with which He made a scab.

'A scab is a two-legged animal with a corkscrew soul, a water brain, a combination backbone of jelly and glue. Where others have hearts, he carries a tumor of rotten principles.

'When a scab comes down the street, men turn their backs and angels weep in Heaven, and the Devil shuts the gates of hell to keep him out.

'No man (or woman) has a right to scab so long as there is a pool of water to drown his carcass in, or a rope long enough to hang his body with. Judas was a gentleman compared with a scab. For betraying his Master, he had character enough to hang himself. A scab has not.

'Esau sold his birthright for a mess of pottage. Judas sold his Savior for thirty pieces of silver. Benedict Arnold sold his country for a promise of a commission in the British Army. The scab sells his birthright, country, his wife, his children and his fellowmen for an unfulfilled promise from his employer.

'Esau was a traitor to himself, Judas was a traitor to his God, Benedict Arnold was a traitor to his country; a SCAB is a traitor to his God, his country, his family and his class!' "

Copies of the June newsletter were distributed to members of the local union, and at least one copy was posted on the "station" bulletin board.

Plaintiff Austin testified that after the June article appeared some of his co-workers stopped speaking to him and otherwise manifested hostility toward him; that on two occasions at social gatherings he was referred to as the scab they were talking about; and that several months after the June publication he began having migraine headaches which were diagnosed by a physician to be the result of tension and nervousness. Brown testified that the article made him upset and nervous; that he had headaches; that he had to work in a hostile atmosphere; and that his co-workers made jokes at his expense and called him names. Ziegengeist testified that he had enjoyed a good relationship with his co-workers, but after the article appeared they became cool toward him; that his wife was distraught; and that he was harassed by union representatives. His

teen-aged daughter testified that the article had upset her mother and father, and they were all afraid that someone might come around the house and harm them.

Angelo Barker testified that he was "Secretary of the Association and editor of the paper." He said that the statement in the text complained of, that plaintiffs were traitors to their country, was made as a figure of speech, not based on fact, and that he could not say whether or not they were traitors. When cross-examined about other statements in the text he said that "Since the plaintiffs were getting the benefits of the union without joining, I think they have rotten principles." The plaintiffs "are in a sense being * * * leech[es] on these people they are associating with every day [and] I think it should be brought to light to the individuals they are associating with, what is going on."

Defendants contend that Code § 8-630 is unconstitutional on its face because it is vague and overbroad and infringes upon the right of free speech that is protected by the First and Fourteenth Amendments.

Code § 8-630 reads as follows:

> "All words which from their usual construction and common acceptation are construed as insults and tend to violence and breach of the peace shall be actionable."

Defendants rely on the recent United States Supreme Court case of *Gooding* v. *Wilson*, 405 U.S. 518, 520-21, 526-28, 92 S.Ct. 1103, 1105, 1108-09, 31 L.Ed.2d 408, 413, 416-17 (1972). The Court held that the Georgia statute, providing that "Any person who shall, without provocation, use to or of another, and in his presence * * * opprobrious words or abusive language, tending to cause a breach of the peace * * * shall be guilty of a misdemeanor," was on its face unconstitutional, vague and overbroad under the First and Fourteenth Amendments because it had "not

been narrowed by Georgia appellate courts to apply only to 'fighting' words which by their very utterance * * * tend to incite an immediate breach of peace," citing *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 572, 62 S.Ct. 766, 769, 86 L.Ed. 1031 (1942).

In Virginia we have held that a civil action brought under Code § 8-630, the insulting words statute, is one for libel or slander and the common-law rules of slander are to be applied, even though the language used is defamatory on its face. *M. Rosenberg & Sons* v. *Craft,* 182 Va. 512, 528, 29 S.E.2d 375, 382-83 (1944); *Carwile* v. *Richmond Newspapers, Inc.,* 196 Va. 1, 6, 82 S.E.2d 588, 591 (1954); *Shupe* v. *Rose's Stores, Inc.,* 213 Va. —, — S.E.2d —, this day decided.

We have also held that a libelous statement, otherwise actionable, may not be so for the reason that the circumstances under which it was published confer upon the publisher a privilege to publish it. The basis for such privilege is the public interest in free expression and communication of ideas. Where this interest is sufficient to outweigh the interest of the State in protecting the individual plaintiff from damage to his reputation and social relationships, the law does not allow recovery of damages, compensatory or punitive, occasioned by defamatory speech or publication, unless there has been an abuse of the privilege by a showing that the defamatory language, either written or spoken, was made with actual malice. See *Story* v. *Newspapers,* 202 Va. 588, 591, 118 S.E.2d 668, 670 (1961); *Sanders* v. *Harris, et al.,* 213 Va. —, — S.E.2d —, this day decided.

Under our construction and limitations of Code § 8-630, only those words which are not protected by the First Amendment are actionable under the statute. Thus the objections of vagueness and overbreadth that were raised in *Gooding* are not applicable in this case.

Defendants contend that the doctrine of federal preemption precludes the State from imposing liability in these cases, since defendants' conduct falls within the area subject to exclusive federal regulation under Executive Order 11491.[1]

The effect of Executive Order 11491, which is essentially equivalent in both content and purpose to the National Labor Relations Act, upon the jurisdiction of state courts to apply state law to an action against a labor union for the publication of libelous statements during a union organizational compaign was determined by the Supreme Court of the United States in *Linn* v. *United Plant Guard Workers,* 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 583 (1966).

A majority of the Court, through Mr. Justice Clark, in *Linn,* said:

> "We conclude that where either party to a labor dispute circulates false and defamatory statements during a union organizing campaign, the court does have jurisdiction to apply state remedies if the complainant pleads and proves that the statements were made with malice and injured him." 383 U.S. at 55, 86 S.Ct. at 659, 15 L.Ed.2d at 583.

The majority of the Court also said:

> "But it must be emphasized that malicious libel enjoys no constitutional protection in any context. After all,

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[1] At the time these cases arose, labor relations in the postal service were regulated by Executive Order 11491, rather than the National Labor Relations Act. Defendants conceded that the Executive Order is essentially equivalent to the Act in both content and purpose, and "is to be accorded the force and effect given the statute enacted by Congress." *Farkas* v. *Texas Instruments, Inc.,* 375 F.2d 629, 632 (5th Cir., 1967), *cert. den.* 389 U.S. 977 (1967). The Postal Reorganization Act, P.L. 91-375, 84 Stat. 719, 39 U.S.C. 101, *et seq.,* enacted August 12, 1970, left this Executive Order in effect until superseded by Chapter 12 thereof, which became effective on July 1, 1971. See 84 Stat. 787, § 15(a). Chapter 12 of PRA makes the National Labor Relations Act, in substance, applicable to the postal service.

the labor movement has grown up and must assume ordinary responsibilities. The malicious utterance of defamatory statements in any form cannot be condoned, and unions should adopt procedures calculated to prevent such abuses." Id. 383 at 63, 86 S.Ct. at 663, 15 L.Ed.2d at 590.

"The malicious publication of libelous statements does not in and of itself constitute an unfair labor practice. * * * The Board [National Labor Relations Board] can award no damages, impose no penalty, or give any other relief to the defamed individual.

"On the contrary, state remedies have been designed to compensate the victim and enable him to vindicate his reputation." Id. 383 at 63-64, 86 S.Ct. at 663, 15 L.Ed.2d at 590.

Hence we hold that Executive Order 11491 has not preempted the state court from exercising jurisdiction in these cases.

Defendants contend that the publication in these cases constituted protected free speech under the First and Fourteenth Amendments to the Constitution of the United States and the doctrine of *New York Times* v. *Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), in the absence of evidence of "convincing clarity" that the statement was factually false and made with the knowledge of its falsity or with reckless disregard of its truth or falsity.

Beginning with *New York Times,* the United States Supreme Court has considered the extent to which state libel laws have to yield to the constitutional protection of freedom of speech and of the press. *New York Times* held that before there can be a recovery of damages in a civil libel action instituted by a "public official" against a newspaper, the constitutional guarantees of freedom of speech and of the press require evidence of convincing clarity that the defamatory falsehood alleged as libel was made "with 'actual malice'—that is with knowledge that it was false

or with reckless disregard of whether it was false or not." 376 U.S. at 279-80, 84 S.Ct. at 726, 11 L.Ed.2d at 706.

The impact of the First Amendment upon state libel laws was broadened to include "public figures" in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967). The plurality opinion in *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971), expanded the *New York Times'* knowing-or-reckless-falsity standard to a state civil libel action brought not by a "public official" or a "public figure" but by a private individual for a defamatory falsehood uttered in a radio broadcast where the statement made concerned an issue of "public or general interest."

In *Rosenbloom* the Supreme Court noted that it "has not yet had occasion to consider the impact of the First Amendment on the application of state libel laws to libels where no issue of general or public interest is involved." 403 U.S. at 48, fn. 17, 91 S.Ct. at 1822, fn. 17, 29 L.Ed.2d at 315, fn. 17.

In the case at bar the plaintiffs had the right to decide for themselves whether they would join the union, under the provisions of Executive Order 11491 and Virginia's "right to work law," Code § 40.1-58 to 40.1-69. The fact that plaintiffs elected not to join the union was only a private matter and an issue of general or public interest was not involved.

Since plaintiffs were neither "public officials" nor "public figures" and whether or not they joined the union did not present an issue of public or general concern, we hold that *New York Times, Butts,* and *Rosenbloom* are not applicable in the cases at bar.

Thus Virginia law, which is applicable in these cases, only required plaintiffs to prove by a preponderance of the evidence that a defamatory publication was made with actual malice.

For words to be considered as defamatory and actionable it is not necessary that the defamation charge be in direct terms. It may be made by inference, implication, innuendo, or insinuation. *Carwile,* 196 Va. at 7, 82 S.E.2d at 591-92; *James* v. *Powell,* 154 Va. 96, 152 S.E. 539 (1930).

Here the text of the publication complained of conveyed to the reader that the plaintiffs were traitors and men of such low character and rotten principles that they should be despised by their fellow workers. Hence this was not a publication protected by the First Amendment.

Instruction No. 4, complained of, reads as follows:

"Under the facts and circumstances of these cases, the statements in question were made upon an occasion known in the law as privileged, and the defendants are not liable for making such statements unless the defendants have abused such privilege.

"Under these circumstances, the burden is upon each plaintiff to prove by a preponderance of the evidence that the defendant Old Dominion Branch 496, National Association of Letter Carriers AFL-CIO, which was acting as the agent of the defendant The National Association of Letter Carriers AFL-CIO, circulated defamatory statements in June of 1970 with actual malice and that such defamatory statements, if any, caused him damage. You may not award damages for statements made at other times or other occasions.

"The statements complained of herein are to be considered defamatory and libelous if the respective plaintiffs prove by a preponderance of the evidence that such statements were in words which from their usual construction and common acceptation are construed as insults and tend to violence and breach of the peace.

"In determining whether or not the language complained of is insulting and tends to violence and a breach of the peace, the words must be construed in the plain and popular sense in which the rest of the community would naturally understand them; that is, they are to be construed according to their usual con-

struction and common acceptation under the circumstances of this case, that is, in a labor dispute.

"The term 'actual malice' is that conduct which shows in fact that at the time the words were printed they were actuated by some sinister or corrupt motive such as hatred, personal spite, ill will, or desire to injure the plaintiff; or that the communication was made with such gross indifference and recklessness as to amount to a wanton or willful disregard of the rights of the plaintiff.

"In this connection you are told, however, that mere words of abuse indicating that one party dislikes another or that he has a low opinion of him, without more, does not amount to defamation. A certain amount of vulgar name calling, indicating hostility or ill will, under certain circumstances is tolerated by the law.

"If you believe that each plaintiff has proven the above elements by a preponderance of the evidence, you shall find your verdict for the plaintiffs, or plaintiff as the case may be, against both defendants, and assess the damages in accordance with the instruction on damages.

"If the plaintiffs, or any one or more of the plaintiffs as the case may be, has failed to prove his case by a preponderance of the evidence, you shall find in favor of the defendants in such case or cases."

The record shows that defendants objected and saved their exceptions to the instruction only on the following grounds: that the preponderance of evidence standard of proof is not applicable here, because under federal law the burden was on the plaintiffs to prove by clear and convincing evidence that the publication was made with actual malice, that is, with knowledge of its falsity or with reckless disregard of whether it was true or false; and that there was no evidence upon which the court could instruct the jury that the local Branch was acting as the agent of the National Association.

Having held that the federal rules as to burden of proof and knowing-or-reckless-falsity standard enunciated in *New*

York Times are not applicable in these cases, we reject defendants' contention that federal law, not Virginia law, should be applied in these cases.

Defendants' objection that the court erred in instructing the jury that the Branch was an agent of the National Association cannot be sustained. The evidence shows that an agency relationship existed between the Branch and the National Association. The publication was under the National Association's insignia, and it was published for the purpose of forcing plaintiffs to join the Branch and the National Association. See *United Constr. Wkrs.* v. *Laburnum*, 194 Va. 872, 879-86, 75 S.E.2d 694, 700-704 (1953), *aff'd* 347 U.S. 656 (1954).

Lastly, defendants contend that the damages are excessive.

In *Linn, supra,* 383 U.S. at 65-66, 86 S.Ct. at 664-65, 15 L.Ed.2d at 591, the Court set out the items of damages that may be considered by a jury. There it was said:

> "We, therefore, hold that a complainant may not recover except upon proof of such harm which may include general injury to reputation, consequent mental suffering, alienation of associates, specific items of pecuniary loss, or whatever form of harm would be recognized by state tort law. * * * Likewise, the defamed party must establish that he has suffered some sort of compensable harm as a prerequisite to the recovery of additional punitive damages."

There is no fixed standard for measuring exemplary or punitive damages, and the amount of the award is largely a matter of discretion with the jury. *United Constr. Wkrs.* v. *Laburnum, supra,* 194 Va. at 895, 75 S.E.2d at 709.

We cannot say from the evidence presented that the amounts of the compensatory and punitive damages awarded plaintiffs were excessive.

For the reasons stated, the judgments are

Affirmed.

APPENDIX B

Executive Order 11491

WHEREAS the public interest requires high standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate improved employee performance and efficiency; and

WHEREAS the well-being of employee and efficient administration of the Government are benefited by providing employee an opportunity to participate in the formulation and implementation of personnel policies and practices affecting the conditions of their employment; and

WHEREAS the participation of employees should be improved through the maintenance of constructive and cooperative relationships between labor organizations and management officials; and

WHEREAS subject to law and the paramount requirements of public service, effective labor-management relations within the Federal service require a clear statement of the respective rights and obligations of labor organizations and agency management:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including sections 3301 and 7301 of title 5 of the United States Code, and as President of the United States, I hereby direct that the following policies shall govern officers and agencies of the Executive Branch of the Government in all dealings with Federal employees and organizations representing such employees.

GENERAL PROVISIONS

Section 1. Policy. (a) Each employee of the executive branch of the Federal Government has the right, freely and without fear of penalty or reprisal, to form, join, and assist

a labor organization or to refrain from any such activity, and each employee shall be protected in the exercise of this right. Except as otherwise expressly provided in this Order, the right to assist a labor organization extends to participation in the management of the organization and acting for the organization in the capacity of an organization representative, including presentation of its views to officials of the Executive Branch, the Congress, or other appropriate authority. The head of each agency shall take the action required to assure that employees in the agency are apprised of their rights under this section, and that no interference, restraint, coercion, or discrimination is practiced within his agency to encourage or discourage membership in a labor organization.

(b) Paragraph (a) of this section does not authorize participation in the management of a labor organization or acting as a representative of such an organization by a supervisor, except as provided in section 24 of this Order, or by an employee when the participation or activity would result in a conflict or apparent conflict of interest or otherwise be incompatible with law or with the official duties of the employee.

Sec. 2 Definitions. When used in this Order, the term—

(a) "Agency" means an executive department, a Government corporation, and an independent establishment as defined in section 104 of title 5, United States Code, except the General Accounting Office;

(b) "Employee" means an employee of an agency and an employee of a nonappropriated fund instrumentality of the United States but does not include, for the purpose of formal or exclusive recognition or national consultation rights, a supervisor, except as provided in section 24 of this order;

(c) "Supervisor" means an employee having authority, in the interest of an agency, to hire, transfer, suspend, lay

off, recall, promote, discharge, assign, reward or discipline other employees, or responsibility to direct them, or to evaluate their performance, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of authority is not of a merely routine or clerical nature, but requires the use of independent judgment;

(d) "Guard" means an employee assigned to enforce against employees and other persons rules to protect agency property or the safety of persons or agency premises, or to maintain law and order in areas or facilities under Government control;

(e) "Labor organization" means a lawful organization of any kind in which employees participate and which exists for the purpose, in whole or in part, of dealing with agencies concerning grievances, personnel policies and practices, or other matters affecting the working conditions of their employees; but does not include an organization which—

(1) consists of management officials or supervisors, except as provided in section 24 of this Order;

(2) asserts the right to strike against the Government of the United States or any agency thereof, or to assist or participate in such a strike, or imposes a duty or obligation to conduct, assist or participate in such a strike;

(3) advocates the overthrow of the constitutional form of government in the United States; or

(4) discriminates with regard to the terms or conditions of membership because of race, color, creed, sex, age or national origin;

(f) "Agency management" means the agency head and all management officials, supervisors, and other representatives of management having authority to act for the agency

on any matters relating to the implementation of the agency labor-management relations program established under this Order;

(g) "Council" means the Federal Labor Relations Council established by this Order;

(h) "Panel" means the Federal Service Impasses Panel established by this Order; and

(i) "Assistant Secretary" means the Assistant Secretary of Labor for Labor-Management Relations.

Sec. 3. Application. (a) This Order applies to all employes and agencies in the executive branch, except as provided in paragraphs (b), (c) and (d) of this section.

(b) This Order (except section 22) does not apply to—

(1) the Federal Bureau of Investigation;

(2) the Central Intelligence Agency;

(3) any other agency, or office, bureau, or entity within an agency, which has as a primary function intelligence, investigative, or security work, when the head of the agency determines, in his sole judgment, that the Order cannot be applied in a manner consistent with national security requirements and considerations; or

(4) any office, bureau or entity within an agency which has as a primary function investigation or audit of the conduct or work of officials or employees of the agency for the purpose of ensuring honesty and integrity in the discharge of their official duties, when the head of the agency determines, in his sole judgment, that the Order cannot be applied in a manner consistent with the internal security of the agency.

(c) The head of an agency may, in his sole judgment, suspend any provision of this Order (except section 22) with respect to any agency installation or activity located out-

side the United States, when he determines that this is necessary in the national interest, subject to the conditions he prescribes.

(d) Employees engaged in administering a labor-management relations law or this Order shall not be represented by a labor organization which also represents other groups of employees under the law or this Order, or which is affiliated directly or indirectly with an organization which represents such a group of employees.

ADMINISTRATION

Sec. 4. Federal Labor Relations Council. (a) There is hereby established the Federal Labor Relations Council, which consists of the Chairman of the Civil Service Commission, who shall be chairman of the Council, the Secretary of Labor, an official of the Executive Office of the President, and such other officials of the executive branch as the President may designate from time to time. The Civil Service Commission shall provide services and staff assistance to the Council to the extent authorized by law.

(b) The Council shall administer and interpret this Order, decide major policy issues, prescribe regulations, and from time to time, report and make recommendations to the President.

(c) The Council may consider, subject to its regulations—

(1) appeals from decisions of the Assistant Secretary issued pursuant to section 6 of this Order;

(2) appeals on negotiability issues as provided in section 11(c) of this Order;

(3) exceptions to arbitration awards; and

(4) other matters it deems appropriate to assure the effectuation of the purposes of this Order.

Sec. 5 Federal Service Impasses Panel. (a) There is hereby established the Federal Service Impasses Panel as an agency within the Council. The Panel consists of at least three members appointed by the President, one of whom he designates as chairman. The Council shall provide the services and staff assistance needed by the Panel.

(b) The Panel may consider negotiation impasses as provided in section 17 of this Order and may take any action it considers necessary to settle an impasse.

(c) The Panel shall prescribe regulations needed to administer its function under this Order.

Sec. 6. Assistant Secretary of Labor for Labor-Management Relations. (a) The Assistant Secretary shall—

(1) decide questions as to the appropriate unit for the purpose of exclusive recognition and related issues submitted for his consideration;

(2) supervise elections to determine whether a labor organization is the choice of a majority of the employees in an appropriate unit as their exclusive representative, and certify the results;

(3) decide questions as to the eligibility of labor organizations for national consultation rights under criteria prescribed by the Council; and

(4) except as provided in section 19(d) of this Order, decide complaints of alleged unfair labor practices and alleged violations of the standards of conduct for labor organizations.

(b) In any matters arising under paragraph (a) of this section, the Assistant Secretary may require an agency or a labor organization to cease and desist from violations of this Order and require it to take such affirmative action as

he considers appropriate to effectuate the policies of this Order.

(c) In performing the duties imposed on him by this section, the Assistant Secretary may request and use the services and assistance of employees of other agencies in accordance with section 1 of the Act of March 4, 1915, (38 Stat. 1084, as amended; 31 U.S.C. § 686).

(d) The Assistant Secretary shall prescribe regulations needed to administer his functions under this Order.

(e) If any matters arising under paragraph (a) of this section involve the Department of Labor, the duties of the Assistant Secretary described in paragraphs (a) and (b) of this section shall be performed by a member of the Civil Service Commission designated by the Chairman of the Commission.

RECOGNITION

Sec. 7. Recognition in general. (a) An agency shall accord exclusive recognition or national consultation rights at the requests of a labor organization which meet the requirements for the recognition or consultation rights under this Order.

(b) A labor organization seeking recognition shall submit to the agency a roster of its officers and representatives, a copy of its constitution and by-laws, and a statement of its objectives.

(c) When recognition of a labor organization has been accorded, the recognition continues as long as the organization continues to meet the requirements of this Order applicable to that recognition, except that this section does not require an election to determine whether an organization should become, or continue to be recognized as, exclusive representative of the employees in any unit or subdivision

thereof within 12 months after a prior valid election with respect to such unit.

(d) Recognition, in whatever form accorded, does not—

(1) preclude an employee, regardless of whether he is a member of a labor organization, from bringing matters of personal concern to the attention of appropriate officials under applicable law, rule, regulations, or established agency policy; or from choosing his own representative in a grievance or appellate action;

(2) preclude or restrict consultants and dealings between an agency and a veterans organization with respect to matters of particular interest to employees with veterans preference; or

(3) preclude an agency from consulting or dealing with a religious, social, fraternal, or other lawful association, not qualified as a labor organization, with respect to matters or policies which involve individual members of the association or are of particular applicability to it or its members.

Consultations and dealings under subparagarph (3) of this paragraph shall be so limited that they do not assume the character of formal consultation on matters of general employee-management policy, except as provided in paragraph (e) of this section, or extend to areas where recognition of the interests of one employee group may result in discrimination against or injury to the interests of other employees.

(e) An agency shall establish a system for intra-management communication and consultation with its supervisors or associations of supervisors. The communications and consultations shall have as their purposes, the improvement of agency operations, the improvement of working conditions of supervisors, the exchange of information, the improvement of managerial effectiveness, and the establish-

ment of policies that best serve the public interest in accomplishing the mission of the agency.

(f) Informal recognition shall not be accorded after the date of this Order.

Sec. 8. Formal Recognition. (a) Formal recognition, including formal recognition at the national level, shall not be accorded after the date of this Order.

(b) An agency shall continue any formal recognition, including formal recognition at the national level, accorded a labor organization before the date of this Order until—

(1) the labor organization ceases to be eligible under this Order for formal recognition so accorded;

(2) a labor organization is accorded exclusive recognition as representative of employees in the unit to which the formal recognition applies; or

(3) the formal recognition is terminated under regulations prescribed by the Federal Labor Relations Council.

(c) When a labor organization holds formal recognition, it is the representative of its members in a unit as defined by the agency when recognition was accorded. The agency, through appropriate officials, shall consult with representatives of the organization from time to time in the formulation and implementation of personnel policies and practices, and matters affecting working conditions that affect members of the organization in the unit to which the formal recognition applies. The organization is entitled from time to time to raise such matters for discussion with appropriate officials and at all times to present its views thereon in writing. The agency is not required to consult with the labor organization on any matter on which it would not be required to meet and confer if the labor organization were entitled to exclusive recognition.

Sec. 9. National consultation rights. (a) An agency shall accord national consultation rights to a labor organization

which qualifies under criteria established by the Federal Labor Relations Council as the representative of a substantial number of employees of the agency. National consultation rights shall not be accorded for any unit where a labor organization already holds exclusive recognition at the national level for that unit. The granting of national consultation rights does not preclude an agency from appropriate dealings at the national level with other organizations on matters affecting their members. An agency shall terminate national consultation rights when the labor organization ceases to qualify under the established criteria.

(b) When a labor organization has been accorded national consultation rights, the agency, through appropriate officials, shall notify representatives of the organization of proposed substantive changes in personnel policies that affect employes it represents and provide an opportunity for the organization to comment on the proposed changes. The labor organization may suggest changes in the agency's personnel policies and have its views carefully considered. It may confer in person at reasonable times, on request, with appropriate officials on personnel policy matters, and at all times present its views thereon in writing. An agency is not required to consult with a labor organization on any matter on which it would not be required to meet and confer if the organization were entitled to exclusive recognition.

(c) Questions as to the eligibility of labor organizations for national consultation rights may be referred to the Assistant Secretary for decision.

Sec. 10. Exclusive recognition. (a) An agency shall accord exclusive recognition to a labor organization when the organization has been selected in a secret ballot election, by a majority of the employees in an appropriate unit as their representative.

(b) A unit may be established on a plant or installation, craft, functional, or other basis which will ensure a clear

and identifiable community of interest among the employees concerned and will promote effective dealings and efficiency of agency operations. A unit shall not be established solely on the basis of the extent to which employees in the proposed unit have organized, nor shall a unit be established if it includes—

(1) any management official or supervisor, except as provided in section 24;

(2) an employee engaged in Federal personnel work in other than a purely clerical capacity;

(3) any guard together with other employees; or

(4) both professional and nonprofessional employees unless a majority of the professional employees vote for inclusion in the unit.

Questions as to the appropriate unit and related issues may be referred to the Assistant Secretary for decision.

(c) An agency shall not accord exclusive recognition to a labor organization as the representative of employees in a unit of guards if the organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(d) All elections shall be conducted under the supervision of the Assistant Secretary, or persons designated by him, and shall be by secret ballot. Each employee eligible to vote shall be provided the opportunity to choose the labor organization he wishes to represent him, from among those on the ballot, or "no union." Elections may be held to determine whether—

(1) a labor organization should be recognized as the exclusive representative of employees in a unit;

(2) a labor organization should replace another labor organization as the exclusive representative; or

(3) a labor organization should cease to be the exclusive representative.

(e) When a labor organization has been accorded exclusive recognition, it is the exclusive representative of employes in the unit and is entitled to act for and to negotiate agreements covering all employes in the unit. It is responsible for representing the interests of all employees in the unit without discrimination and without regard to labor organization membership. The labor organization shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievences, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

AGREEMENTS

Sec. 11. Negotiation of agreements.(a) An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations, including policies set forth in the Federal Personnel Manual, published agency policies and regulations, a national or other controlling agreement at a higher level in the agency, and this Order. They may negotiate an agreement, or any question arising thereunder; determine appropriate techniques, consistent with section 17 of this Order, to assist in such negotiation; and execute a written agreement or memorandum of understanding.

(b) In prescribing regulations relating to personnel policies and practices and working conditions, an agency shall have due regard for the obligation imposed by paragraph (a) of this section. However, the obligation to meet and

confer does not include matters with respect to the mission of an agency; its budget; its organization; the number of employees; and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty; the technology of performing its work; or its internal security practices. This does not preclude the parties from negotiating agreements providing appropriate arrangements for employes adversely affected by the impact of realignment of work forces or technological change.

(c) If, in connection with negotiations, an issue develops as to whether a proposal is contrary to law, regulation, controlling agreement, or this Order and therefore not negotiable, it shall be resolved as follows:

(1) An issue which involves interpretation of a controlling agreement at a higher agency level is resolved under the procedures of the controlling agreement, or, if none, under agency regulations;

(2) An issue other than as described in subparagraph (1) of this paragraph which arises at a local level may be referred by either party to the head of the agency for determination;

(3) An agency head's determination as to the interpretation of the agency's regulations with respect to a proposal is final;

(4) A labor organization may appeal to the Council for a decision when—

(i) it disagrees with an agency head's determination that a proposal would violate applicable law, regulation of appropriate authority outside the agency, or this Order, or

(ii) it believes that an agency's regulations, as interpreted by the agency head, violate applicable law, regulation of appropriate authority outside the agency, or this Order.

Sec. 12. Basic of agreements. Each agreement between an agency and a labor organization is subject to the following requirements—

(a) in the administration of all matters covered by the agreement, officials and employees are governed by existing or future laws and the regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual; by published agency policies and regulations in existence at the time the agreement was approved; and by subsequently published agency policies and regulations required by law or by the regulations of appropriate authorities, or authorized by the terms of a controlling agreement at a higher agency level:

(1) to direct employees of the agency;

(2) to hire, promote, transfer, assign, and retain employees in positions within the agency, and to suspend, demote, discharge, or take other disciplinary action against employees;

(3) to relieve employees from duties because of lack of work or for other legitimate reasons;

(4) to maintain the efficiency of the Government operations entrusted to them;

(5) to determine the methods, means, and personnel by which such operations are to be conducted; and

(6) to take whatever actions may be necessary to carry out the mission of the agency in situations of emergency; and

(c) nothing in the agreement shall require an employee to become or to remain a member of a labor organization, or to pay money to the organization except pursuant to a voluntary, written authorization by a member for the payment of dues through payroll deductions.

The requirements of this section shall be expressly stated in the initial or basic agreement and apply to all supple-

mental, implementing, subsidiary, or informal agreements between the agency and the organization.

Sec. 13. Grievance procedures. An agreement with a labor organization which is the exclusive representative of employees in an appropriate unit may provide procedures, applicable only to employes in the unit, for the consideration of employee grievances and of disputes over the interpretation and application of agreements. The procedure for consideration of employee grievances shall meet the requirements for negotiated grievance procedures established by the Civil Service Commission. A negotiated employee grievance procedure which conforms to this section, to applicable laws, and to regulations of the Civil Service Commission and the agency in the exclusive procedure available to employees in the unit when the agreement so provides.

Sec. 14 Arbitration of grievances. (a) Negotiated procedures may provide for the arbitration of employee grievances and of disputes over the interpretation of application of existing agreements. Negotiated procedures may not extend arbitration to changes or proposed changes in agreements or agency policy. Such procedures shall provide for the invoking of arbitration only with the approval of the labor organization that has exclusive recognition and, in the case of an employee grievance, only with the approval of the employee. The costs of the arbitrator shall be shared equally by the parties.

(b) Either party may file exceptions to an arbitrator's award with the Council, under regulations prescribed by the Council.

Sec. 15. Approval of agreements. An agreement with a labor organization as the exclusive representative of employes in a unit is subject to the approval of the head of the agency or an official designated by him. An agreement shall be approved if it conforms to applicable laws, existing pub-

lished agency policies and regulations (unless the agency has granted an exception to a policy or regulation) and regulations of other appropriate authorities. A local agreement subject to a national or other controlling agreement at a higher level shall be approved under the procedures of the controlling agreement, or, if none, under agency regulations.

NEGOTIATION DISPUTES AND IMPASSES

Sec. 16. Negotiation disputes. The Federal Mediation and Conciliation Service shall provide services and assistance to Federal agencies and labor organizations in the resolution of negotiation disputes. The Service shall determine under what circumstances and in what manner it shall proffer its services.

Sec. 17. Negotiation impasses. When voluntary arrangements, including the services of the Federal Mediation and Conciliation Service or other third-party mediation, fail to resolve a negotiation impasse, either party may request the Federal Service Impasses Panel to consider the matter. The Panel, in its discretion and under the regulations it prescribes, may consider the matter and may recommend procedures to the parties for the resolution of the impasse or may settle the impasse by appropriate action. Arbitration or third-party fact finding with recommendations to assist in the resolution of an impasse may be used by the parties only when authorized or directed by the Panel.

CONDUCT OF LABOR ORGANIZATION AND MANAGEMENT

Sec. 18. Standards of conduct for labor organizations.

(a) An agency shall accord recognition only to a labor organization that is free from corrupt influences and influences opposed to basic democratic principles. Except as provided in paragraph (b) of this section, an organization is not required to prove that it has the required freedom when it is subject to governing requirements adopted by the

organization or by a national or international labor organization or federation of labor organizations with which it is affiliated or in which it participates, containing explicit and detailed provisions to which it subscribes calling for—

(1) the maintenance of democratic procedures and practices, including provisions for periodic elections to be conducted subject to recognized safeguards and provisions defining and securing the right of individual members to participation in the affairs of the organization, to fair and equal treatment under the governing rules of the organization, and to fair process in disciplinary procedures;

(2) the exclusion from office in the organization of persons affiliated with Communist or other totalitarian movements and persons identified with corrupt influences;

(3) the prohibition of business or financial interests on the part of organization officers and agents which conflict with their duty to the organization and its members; and

(4) the maintenance of fiscal integrity in the conduct of the affairs of the organization, including provision for accounting and financial controls and regular financial reports or summaries to be made available to members.

(b) Notwithstanding the fact that a labor organization has adopted or subscribed to standards of conduct as provided in paragraph (a) of this section, the organization is required to furnish evidence of its freedom from corrupt influences opposed to basic democratic principles when there is reasonable cause to believe that—

(1) the organization has been suspended or expelled from or is subject to other sanction by a parent labor organization or federation of organizations with which it had been affiliated because it has demonstrated an unwillingness or inability to comply with governing requirements comparable in purpose to those required by paragraph (a) of this section; or

(2) the organization is in fact subject to influences that would preclude recognition under this Order.

(c) A labor organization which has or seeks recognition as a representative of employees under this Order shall file financial and other reports, provide for bonding of officials and employes of the organization, and comply with trusteeship and election standards.

(d) The Assistant Secretary shall prescribe the regulations needed to effectuate this section. These regulations shall conform generally to the principles applied to unions in the private sector. Complaints of violations of this section shall be filed with the Assistant Secretary.

Sec. 19. Unfair labor practices. (a) Agency management shall not—

(1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order;

(2) encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment;

(3) sponsor, control, or otherwise assist a labor organization, except that an agency may furnish customary and routine services and facilities under section 23 of this Order when consistent with the best interests of the agency, its employees, and the organization, and when the services and facilities are furnished, if requested, on an impartial basis to organizations having equivalent status;

(4) discipline or otherwise discriminate against an employee because he has filed a complaint or given testimony under this Order;

(5) refuse to accord appropriate recognition to a labor organization qualified to such recognition; or

(6) refuse to consult, confer, or negotiate with a labor organization as required by this Order.

(b) A labor organization shall not—

(1) interfere with, restrain, or coerce an employee in the exercise of his rights assured by this Order;

(2) attempt to induce agency management to coerce an employee in the exercise of his rights under this Order;

(3) coerce, attempt to coerce, or discipline, fine, or take other economic sanction against a member of the organization as punishment or reprisal for, or for the purpose of hindering or impeding his work performance, his productivity, or the discharge of his duties owed as an officer or employee of the United States;

(4) call or engage in a strike, work stoppage, or slowdown; picket an agency in a labor-management dispute; or condone any such activity by failing to take affirmative action to prevent or stop it;

(5) discriminate against an employee with regard to the terms or conditions of membership because of race, color, creed, sex, age, or national origin; or

(6) refuse to consult, confer, or negotiate with an agency as required by this Order.

(c) A labor organization which is accorded exclusive recognition shall not deny membership to any employee in the appropriate unit except for failure to meet reasonable occupational standards uniformly required for admission, or for failure to tender initiation fees and dues uniformly required as a condition of acquiring and retaining membership. This paragraph does not preclude a labor organization from enforcing discipline in accordance with procedures under its constitution or by-laws which conform to the requirements of this Order.

(d) When the issue in a complaint of an alleged violation of paragraph (a)(1), (2) or (4) of this section is subject to an established grievance or appeals procedure, that procedure is the exclusive procedure for resolving the complaint. All other complaints of alleged violations of this section initiated by an employee, an agency, or a labor organization, that cannot be resolved by the parties, shall be filed with the Assistant Secretary.

Miscellaneous Provisions

Sec. 20. Use of official time. Solicitation of membership or dues, and other internal business of a labor organization,

shall be conducted during the non-duty hours of the employees concerned. Employees who represent a recognized labor organization shall not be on official time when negotiating an agreement with agency management.

Sec. 21. Allotment of dues. (a) When a labor organization holds formal or exclusive recognition, and the agency and the organization agree in writing to this course of action, an agency may deduct the regular and periodic dues of the organization from the pay of members of the organization in the unit of recognition who make a voluntary allotment for that purpose, and shall recover the costs of making the deductions. Such an allotment is subject to the regulations of the Civil Service Commission, which shall include provision for the employee to revoke his authorization at stated six-month intervals. Such an allotment terminates when—

(1) the dues withholding agreement between the agency and the labor organization is terminated or ceases to be applicable to the employee; or

(2) the employee has been suspended or expelled from the labor organization.

(b) An agency may deduct the regular and periodic dues of an association of management officials or supervisors from the pay of members of the association who make a voluntary allotment for that purpose, and shall recover the costs of making the deductions, when the agency and the association agree in writing to this course of action. Such an allotment is subject to the regulations of the Civil Service Commission.

Sec. 22. Adverse action appeals. The head of each agency, in accordance with the provisions of this Order and regulations prescribed by the Civil Service Commission, shall extend to all employees in the competitive civil service rights identical in adverse action cases to those provided preference eligible under sections 7511-7512 of title 5 of the United States Code. Each employee in the competitive service shall have the right to appeal in the Civil Service Commission from an adverse decision of the administrative

officer so acting, such appeal to be processed in an identical manner to that provided for appeals under section 7701 of title 5 of the United States Code. Any recommendation by the Civil Service Commission submitted to the head of an agency on the basis of an appeal by an employee in the competitive service shall be complied with by the head of the agency.

Sec. 23. Agency implementation. No later than April 1, 1970, each agency shall issue appropriate policies and regulations consistent with this Order for its implementation. This includes but is not limited to a clear statement of the rights of its employees under this Order; procedures with respect to recognition of labor organizations, determination of appropriate units, consultation with labor organizations, approval of agreements, mediation, and impasse resolution; policies with respect to the use of agency facilities by labor organizations; and policies and practices regarding consultation with other organizations and associations and individual employees. Insofar as practicable, agencies shall consult with representatives of labor organizations in the formulation of these policies and regulations, other than those for the implementation of section 7(e) of this Order.

Sec. 24. Savings clauses. (a) This Order does not preclude—

(1) the renewal or continuation of a lawful agreement between an agency and a representative of its employees entered into before the effective date of Executive Order No. 10988 (January 17, 1962); or

(2) the renewal, continuation, or initial according of recognition for units of management officials or supervisors represented by labor organizations which historically or traditionally represent the management officials or supervisors in private industry and which hold exclusive recognition for units of such officials or supervisors in any agency on the date of this Order.

(b) All grants of informal recognition under Executive Order No. 10988 terminate on July 1, 1970.

(c) All grants of formal recognition under Executive Order No. 10988 terminate under regulations which the Federal Labor Relations Council shall issue before October 1, 1970.

(d) By not later than December 31, 1970, all supervisors shall be excluded from units of formal and exclusive recognition and from coverage by negotiated agreements, except as provided in paragraph (a) of this section.

Sec. 25. Guidance, training, review and information.

(a) The Civil Service Commission shall establish and maintain a program for the guidance of agencies on labor-management relations in the Federal service; provide technical advice and information to agencies; assist in the development of programs for training agency personnel and management officials in labor-management relations; continuously review the operation of the Federal labor-management relations program to assist in assuring adherence to its provisions and merit system requirements; and, from time to time, report to the Council on the state of the program with any recommendations for its improvement.

(b) The Department of Labor and the Civil Service Commission shall develop programs for the collection and dissemination of information appropriate to the needs of agencies, organizations and the public.

Sec. 26. Effective date. This Order is effective on January 1, 1970 except sections 7(f) and 8 which are effective immediately. Effective January 1, 1970, Executive Order No. 10988 and the President's Memorandum of May 21, 1963, entitled Standards of Conduct for Employee Organizations and Code of Fair Labor Practices, are revoked.

RICHARD NIXON

THE WHITE HOUSE
OCTOBER 29, 1969

APPENDIX C

IN THE SUPREME COURT OF VIRGINIA

Record No.7917

OLD DOMINION BRANCH No. 496, National Association of Letter Carriers, AFL-CIO, and National Association of Letter Carriers, AFL-CIO,

Plaintiffs in Error,

v.

HENRY M. AUSTIN, *Defendant in Error.*

Notice of Appeal

PLEASE TAKE NOTICE that plaintiffs in error, Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO, and National Association of Letter Carriers, AFL-CIO, hereby appeal to the Supreme Court of the United States from the judgment of the Court entered against them in this action on November 27, 1972.

This appeal is taken pursuant to 28 U.S.C. § 1257.

Respectfully submitted,

Mozart G. Ratner
818 Eighteenth Street, N.W.
Washington, D. C. 20006

Israel Steingold
819 Citizens Bank Building
Norfolk, Virginia 23514

Attorneys for Plaintiff in Error.

Filed
Dec 20, 1972

IN THE SUPREME COURT OF VIRGINIA

Record No. 7118

OLD DOMINION BRANCH No. 496, National Association of Letter Carriers, AFL-CIO, and National Association of Letter Carriers, AFL-CIO,

Plaintiffs in Error,

v.

L. D. BROWN, *Defendant in Error.*

Notice of Appeal

PLEASE TAKE NOTICE that plaintiffs in error, Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO, and National Association of Letter Carriers, AFL-CIO, hereby appeal to the Supreme Court of the United States from the judgment of the Court entered against them in this action on November 27, 1972.

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818 Eighteenth Street, N.W.
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Norfolk, Virginia 23514

Attorneys for Plaintiff in Error.

Filed
Dec 20, 1972

IN THE SUPREME COURT OF VIRGINIA

Record No. 7119

OLD DOMINION BRANCH No. 496, National Association of Letter Carriers, AFL-CIO, and National Association of Letter Carriers, AFL-CIO,

Plaintiffs in Error,

v.

ROY P. ZIEGENGEIST, *Defendant in Error.*

Notice of Appeal

PLEASE TAKE NOTICE that plaintiffs in error, Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO, and National Association of Letter Carriers, AFL-CIO, hereby appeal to the Supreme Court of the United States from the judgment of the Court entered against them in this action on November 27, 1972.

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Israel Steingold
819 Citizens Bank Building
Norfolk, Virginia 23514

Attorneys for Plaintiff in Error.

Filed
Dec 20, 1972

Certificate of Service

I hereby certify that copies of the foregoing Notice of Appeal, have been served this 18th day of December, 1972, by first-class mail, postage prepaid, upon:

Parker E. Cherry, Esq., 1012 Mutual Building, Richmond, Virginia 23219.

Stephen M. Kapral, Esq., 4510 S. Laburnum Avenue, Richmond, Virginia 23231. All parties required to be served have been served in accordance with Rule 33 of the Rules of the Supreme Court of the United States.

MOZART G. RATNER